Supreme Court, U.S.
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No. 98-1135

In The

Supreme Court of the United States

October Term, 1998

AQUATHERM INDUSTRIES, INC.,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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LIST OF CORPORATIONS RELATED TO CORPORATE PETITIONER

No other corporations are related to the petitioner, Aquatherm Industries, Inc.

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ARGUMENT

In its Petition ("Pet."), Aquatherm Industries, Inc. ("Aquatherm") showed that antitrust law's central mission is to keep markets free and open, so that competition takes place on the merits. Aquatherm further showed that this principle inexorably leads to the conclusion that where a regulated utility such as FPL seeks to use its monopoly power to thwart competition on the merits in a related "input" market – for the purposes of increasing the utility's own monopoly profits, and of conferring unearned dominance on one group of competitors in the input market – antitrust law is violated. And Aquatherm showed that the Eleventh Circuit's decision below, if left to stand, will serve as precedent – indeed as a **blueprint** – for utilities to engage in similar tampering with input markets without fear of antitrust reprisals.

In its Brief in Opposition ("Opp."), FPL makes no attempt whatever to defend its blatant lies to customers that a heat pump is "the most cost-effective pool heating method available." Nor does it deny that it spearheaded a widespread campaign to induce customers to give their business to "FPL Participating Contractors" (including giving rebates to its customers and awards to heat pump installers).

Instead, FPL offers up an array of arguments designed to obfuscate rather than to clarify. For the Court's convenience, FPL's insupportable positions are disposed of in the order presented by it. The bottom line is that FPL's positions only underscore the need for this Court to grant certiorari here, and to undo the damage which the Eleventh Circuit's misguided opinion threatens to the free market.

I. FPL IMPROPERLY ARGUES FACTS NOT IN THE RECORD, AND SEEKS TO AVOID REVIEW ON THE FALSE BASIS THAT IT WOULD MIRE THIS COURT IN A THICKET OF DISPUTED FACTS AND EVIDENCE.

As Aquatherm showed (Pet. 25-26), the law is well settled that, on a motion to dismiss its complaint, its allegations are to be taken as true, including all reasonable inferences

arising therefrom; and that its pleading is not to be dismissed with prejudice unless it is clear beyond doubt that Aquatherm can state no set of facts entitling it to relief.

FPL does not dispute that these legal principles govern. Yet, FPL improperly seeks to argue "facts" not in this case (Opp. 2-5).[1] Even where FPL cites to regulations, it misrepresents their thrust. For example, FPL disputes that applicable regulations required that it recommend solar pool heaters to customers (Opp. 2-3). But the pertinent regulations, set out in an Appendix attached hereto, are squarely to the contrary. (And while FPL's flouting of regulatory obligations is relevant, it is not an essential element of any antitrust offense charged, in any event.)

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[1] FPL's Response (at pp. 2-5) is replete with numerous statements of alleged fact, not based on the record (i.e., not in the complaint), and disputed by Aquatherm. They include:

- That "[i]f requested by a customer, FPL will explain the different types of pool heating systems (solar, natural gas, heat pump, and electrical resistance) and provide a list of suppliers."
- That "[t]here has never been, however, a requirement to encourage solar pool heating."
- That "FPL's employees did not refuse to inform customers about solar heaters."
- That "FPL did not lie about the merits of PHPs."
- That "PHPs operate at a constant, high load factor, which indirectly benefits FPL by improving the efficiency of utilization of its system."
- The year in which the PHP promotion program began, and the fact of and date of expansion of the program.
- That "FPL gave similar benefits [to those given to residential customers] to commercial customers."
- That "FPL's analysis of the costs and benefits of the program did not demonstrate cost-effectiveness" and "[c]onsequently, FPL terminated this incentive program in 1990, less than three years after it began and about one year before Aquatherm filed its original suit."

Significantly, FPL concedes that it distributed literature comparing pool heating systems but omitting solar heaters (Opp. 4). And while feigning ignorance of its co-conspirators' identities, FPL concedes that its "**listed** contractors were given permission . . . to use FPL's corporate logo to show their participation in the PHP program" (Opp. 5).

It is obvious that, by referring to factual disputes, FPL seeks to mislead this Court into denying certiorari out of concern that this appeal would bog this Court down in a morass of factual crossfire. Hence, FPL incorrectly states that "this case turns on its particular facts" (Opp. 5). But this appeal turns on fundamental principles of antitrust law, **as applied to the facts set forth in Aquatherm's complaint**.

II. FPL MISCHARACTERIZES AS "DICTA" THE ELEVENTH CIRCUIT'S ERRONEOUS HOLDING THAT A DEFENDANT CANNOT CONSPIRE TO MONOPOLIZE A MARKET IN WHICH IT DOES NOT COMPETE.

Aquatherm went to great lengths, both here (Pet. 19-20 & n. 7) and below, to cite a plethora of case authorities standing for the principle that a defendant can be liable for conspiring to monopolize or to restrain trade in a market in which it does not compete. And Aquatherm went on (Pet. 19, 21) to show that traditional legal principles make every member of an antitrust conspiracy jointly **and severally** liable for all damages caused by the conspiracy. There is no logical reason to require that a defendant, such as FPL, be shown to have competed in the targeted market, so long as the defendant shares the goal, and stands to benefit from achievement, of the monopolization or restraint of the targeted market.[2]

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[2] Here, the heat pump sellers benefitted directly by referrals from FPL resulting from FPL's fraud and FPL's conduct as their sales agent; and FPL benefitted indirectly from increased consumption of electricity. But all of these benefits derived from the conspiracy's success in tampering with free market forces in the pool heating market.

However, the Eleventh Circuit casually dismissed all of Aquatherm's arguments and legal authorities, with the sweeping and unsupported statement: "Equally fatal to Aquatherm's conspiracy allegation is the fact that no authority exists holding a defendant can conspire to monopolize a market in which it does not compete" (Pet.App. 6 n. 4).

FPL improperly seeks to trivialize and minimize the Eleventh Circuit's statement as mere "dicta" (Opp. 6-8) – suggesting that it is superfluous, not binding on lower courts within its circuit, and not precedent for courts in other circuits to cite and apply. FPL is inexcusably wrong. It is well settled, and every lawyer should know, that alternative decisional grounds are part of the holding, not dicta:

> Where the opinion accompanying a decision invoked as a precedent states several reasons for the decision, although a single reason would have been sufficient to support the holding reached, **none of the reasons indicated is to be considered as a mere dictum**; rather, each is to be treated as a precedent embraced by stare decisis.

20 Am.Jur.2d *Courts* § 154, p. 441 (1995) (emphasis added).

Moreover, the Eleventh Circuit's error in its footnote 4 infects its entire opinion. Throughout, that court continually and emphatically attached significance to the fact that Aquatherm and FPL are not direct competitors.[3] Thus, its incorrect statement of law in its footnote 4 is not only part of its holding, but is the foundation for its decision to let FPL walk away without even answering Aquatherm's allegations.

Next, FPL engages in an outlandish sleight-of-hand at page 8 of its Brief, where it states (emphasis by FPL):

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[3] See Pet.App. at 2 ("FPL does not sell [heat pumps] or any other swimming pool equipment"); 4 ("In fact, Aquatherm does not assert that FPL ever *competed* in the pool-heater market"); 6 ("As discussed, there is no showing that FPL in any way sought a competitive advantage in the pool-heater market, because FPL did not *compete* in the pool-heater market"); 7 (referring to this case as "a situation in which a monopolist projects its power into a market it not only does not seek to monopolize, but in which it does not even seek to compete") (all emphases by court).

> *Out of context*, the Eleventh Circuit's footnote perhaps raises an academic question: Can a party be liable under Section 2 of the Sherman Act for conspiring to monopolize *for itself* or *for others* a market in which it does not compete? In context, it is clear that the Eleventh Circuit was referring only to the inability of FPL to monopolize for itself a market in which it does not compete. The *dicta* in the footnote clearly does [sic] not preclude the possibility of a conspiracy to monopolize for others a market for others in which a defendant does not compete.

Despite FPL's wishful thinking to the contrary, the Eleventh Circuit's language in footnote 4 plainly and unambiguously **does** address whether "a defendant can conspire to monopolize a market in which it does not compete," holding that it cannot. Contrary to FPL's disingenuous statement, the footnote does **not** concern "the inability of FPL to monopolize **for itself** a market in which it does not compete."[4] FPL's lame attempts to minimize and distort the footnote underscore that the lower court opinion releasing FPL from this suit cannot withstand careful review and analysis, and that it merits the granting of certiorari and reversal by this Court.

FPL also errs (Opp. 7-10) in baldly asserting that the Eleventh Circuit's statement of law in its footnote 4 is correct anyway. The Eleventh Circuit offered no legal support for its position. Aquatherm's numerous cases are cited because they plainly state the applicable principle of law: *viz.*, that one need not be a competitor in the targeted relevant market to be

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[4] While FPL is wrong that the lower court's statements are dicta, it apparently agrees with Aquatherm as to what the law **should** be: "The *dicta* in the footnote clearly does not preclude the possibility of a conspiracy to monopolize for others a market for others in which a defendant does not participate." (Opp. 8.) Yet, FPL's position here **depends** on a contrary conclusion.

a member of, and liable for, a conspiracy to monopolize or to restrain trade in the targeted market.[5]

FPL (Opp. 10-13) seeks to distinguish Aquatherm's cited cases on the basis that some (but hardly all) dealt with Sherman Act § 1 conspiracies, which differ from Sherman Act § 2 conspiracies. In the context of this case, however, the differences are not meaningful, and FPL never shows how they are. Section 1 conspiracies unreasonably restrain trade even if they do not seek monopoly power, while § 2 conspiracies seek to obtain monopoly power regardless of whether it is actually used. *American Tobacco Co. v. United States*, 328 U.S. 781, 788-89, 809 (1946). But as this Court noted in *American Tobacco*, "the objects of the conspiracies may partially overlap." *Id.* at 788. Here, as in *American Tobacco*, *id.* at 808, the allegations of FPL's heat pump program support both types of conspiracies (see Pet. 16-22).

Additionally, FPL seeks to distinguish Aquatherm's authorities on the basis that the violations discussed are structurally different (*e.g.*, some dealt with vertical price restrictions, others with exclusive dealing claims, etc.). Again, however, it is the legal principle that one may be liable for conspiring to monopolize or restrain trade in a market in which one does not compete which binds these cases, and for

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[5] FPL (Opp. 8-9) glibly attempts to sweep away each potential relevant market which Aquatherm's pleading plainly could support. But FPL never offers any analysis or case law to undermine Aquatherm's careful showings (Pet. 16-25) in support of claims focusing on: (a) the pool heater market; or (b) the electricity market in which FPL admittedly has a monopoly; or (c) a market of energy for pool heaters, which FPL plainly sought to dominate for itself (FPL asserts [Opp. 9] that it "has no monopoly [in this third market] to maintain or enhance," but its statement is illogical and unfounded). Instead, FPL consciously misstates the record below, asserting that "Aquatherm never raised in its complaint nor in its briefs to the Eleventh Circuit the other conceivable fact pattern – where FPL allegedly conspired with [heat pump] manufacturers and installers to monopolize the market for them" (Opp. 10). This fact pattern was extensively briefed by Aquatherm before both lower courts.

which they are cited. That they involve myriad patterns underscores how widely applicable that principle is.[6]

III. WHETHER THIS IS A SO-CALLED "REGULATORY CIRCUMVENTION CASE" IS IRRELEVANT.

FPL erects a phony straw man, then knocks it down:

> Aquatherm's premise is that this case involves a classic regulatory circumvention scheme in which a regulated utility has much to gain from promoting sales of related equipment because the revenue from the related equipment in an unregulated market will escape the Public Service Commission's scrutiny. As both the district court and the Eleventh Circuit found, Aquatherm's premise is fundamentally flawed. *FPL's increased revenues will come, if at all, from an increased sale of electricity and will not escape the regulatory agency's scrutiny.*

(Opp. 13-14; emphasis by FPL.) Aquatherm has **never** alleged that FPL's reward for conspiring would be other than from increased electricity sales and profits. Yet FPL offers no support for its assertion that the Public Service Commission would somehow divine that FPL is selling more electricity because customers have been buying artificially-inflated quantities of heat pumps, and then take steps to rein in FPL.

Moreover, FPL's authorities in no way support its claim that "[r]egulatory circumvention schemes are perhaps the one situation in which current antitrust scholars and jurists

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[6] FPL asserts (Opp. 12-13): "Scholars have questioned whether there is such a thing as a conspiracy to monopolize under Section 2 based on an agreement among parties at different levels in a market or, as here, in different markets altogether." Yet FPL's cited support says no such thing. But if it did, it would only emphasize the need for this Court's guidance on the issue.

acknowledge that it makes economic sense for a monopolist to attempt to extend its monopoly . . . " (Opp.Br. 13-14 n. 3).[7]

IV. THE ELEVENTH CIRCUIT ERRED IN CONCLUDING THAT AQUATHERM COULD PROVE NO SET OF FACTS TO SUPPORT ITS CLAIMS.

FPL cannot dispute that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can plead no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (cited at Pet. 25-26).

Instead, FPL (Opp. 14-18) offers up a smorgasbord of claimed bases for the lower court's conclusion that Aquatherm could prove no set of facts to support its claims. However, each of FPL's contentions is belied not only by the actual allegations of Aquatherm's pleading, but also by the reality that what FPL contends are pleading infirmities – lack of co-conspirator identification, lack of an agreement between FPL and its cronies, lack of allegations of marketwide injury – are all plainly salvageable through amendment; *i.e.*, there is no inherently irreparable shortcoming in Aquatherm's pleading.

Aside from FPL's awareness of who its conspirators are (shown *supra* and at Pet. 7 & 27-28), it ignores Aquatherm's discussion of legal standards (Pet. 28-29 & n. 11).

The conspiratorial agreement between FPL and its cronies is plainly evident from the Amended Complaint, the gist of which is that FPL established its heat pump program, then enlisted heat pump sellers and "FPL Participating Contractors," by assuming all of their marketing and promotional

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[7] FPL's authorities generally deal merely with whether a monopolist in one product market would obtain greater profits from participating in a second product market by bundling both products; but such bundling usually adds no extra profit beyond what the monopolist could have obtained without bundling. The issue logically has nothing to do with FPL increasing profits **from sales of electricity** by conspiring to impact the pool heater market, and neither of the lower court opinions turned on it.

costs (with FPL's monopoly profits), by persuading customers (through fraud and rebates) to buy heat pumps from them (instead of solar heaters), and by giving awards to those cronies who sold the most heat pumps.[8] The allegations give rise to the reasonable inference that FPL and its co-conspirators shared the specific intent that the co-conspirators dominate the pool heater market, for their direct benefit, and to increase FPL's electricity sales.[9]

Lastly, FPL contends that Aquatherm's pleading lacks allegations of marketwide restraints, contending that the only such allegations are that deceptive advertising injured solar pool heater sellers and Aquatherm. (Opp. 17-18.) FPL focuses on Aquatherm's two examples offered at Pet. 17 n. 6, namely the allegations found at Pet.App. 52 ¶ 61 and Pet.App. ¶ 68. But neither of those paragraphs is limited to deceptive advertising, and each alleges that the concerted conduct adversely impacted competition from solar heating systems.

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[8] As this Court stated in *American Tobacco*, *supra*, in discussing conspiracies to monopolize: "No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts. . . . The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in any exchange of words." 328 U.S. at 809.

[9] FPL's claim that "[e]ach time . . . an installer did a job and was rebated, it was a single transaction between FPL and the installation contractor, with no strings attached" (Opp. 16-17) makes no sense. Each such transaction was part of the massive, ongoing program spearheaded by FPL. That there were "no strings attached" – apparently suggesting that a contractor could enter and leave FPL's program at will – merely underscores that the contractors willingly participated. Nowhere in antitrust jurisprudence is it required that co-conspirators' participation be coerced. And FPL's claim that Aquatherm could never show "that the installers agreed among themselves to install only electric pool heating equipment" (Opp. 17) is equally senseless: the contractors were given the title "FPL Participating Contractors" by FPL; surely, each knew that there had to be other participating contractors (thus putting a "rim" around the "wheel" conspiracy, with FPL at its "hub").

FPL also seeks to focus on allegations referring only to solar heater restraint, rather than restraint of the pool heater market as a whole. But FPL misses key points: (1) there are other allegations of restraint of "pool heating systems" (*e.g.*, Pet.App. 46 ¶ 33 & 48 ¶ 45, incorporated into later counts); (2) the pleading also alleges prevention of consumers' freedom of choice (*e.g.*, Pet.App. 47 ¶ 36 & 49 ¶ 49) and output restrictions (*e.g.*, 47 ¶ 37 & 49 ¶ 48), also indicating marketwide restraint (these allegations also are incorporated into later counts); and (3) the heat pump campaign targeted solar heaters because they are the most meaningful competition to heat pumps – which is why FPL omitted reference to solar heaters (thus, marketwide restraint resulted from restraining solar heaters).

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Fla. Admin. Code r. 25-17.057 provides, in pertinent part:

> (1) Unless an alternative method is authorized . . . , the auditor **shall make recommendations** and provide the audit results and any recommendations to the customer. . . .
>
> (2) The auditor shall provide the customer with:
>
> (a) The estimated energy and overall cost savings that would likely result from **each applicable energy conservation measure** . . . ;
>
> (b) An estimation of the total installation cost for each conservation measure . . . ;
>
> (c) The annual ordinary maintenance cost, if any, for each conservation measure;
>
> (d) The first year's energy savings in dollars or a range of dollars for each conservation measure. . . .

(Emphasis added.)

Fla. Admin. Code r. 25-17.051 provides, in pertinent part:

> (10) **"Conservation measures"** refer to the following energy conservation techniques:
>
> * * *
>
> (s) Use of any of the following renewable resource measures:
>
> 1. Solar domestic water heating;
>
> 2. **Solar swimming pool heating** (where pools are presently heated with a non-renewable resource).

(Emphasis added.)